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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

CC Docket No. 98-65

In the Matter of)
)
)

Petition of Ameritech Corporation)
for Forbearance from Enforcement)
of Section 275(a))
)
)

To: The Commission

**REPLY TO OPPOSITIONS TO
PETITION FOR RECONSIDERATION**

Pursuant to Part 1.106 of the Commission's rules, Ameritech Corp.

("Ameritech") submits this reply to the oppositions of the Alarm Monitoring Coordinating Committee ("AICC") and AT&T Corp. ("AT&T") to Ameritech's Petition for Reconsideration ("Petition") of the issue decided by the Commission in its Report and Order ("*Order*" or "*Section 275(a) Forbearance Order*") released in the above-captioned docket on August 31, 1999. The *Order* denied Ameritech's petition for forbearance under Section 10 of the Communications Act of 1934 (the "Communications Act"), as amended by the Telecommunications Act of 1996 (the "1996 Act"), from the application to Ameritech of Section

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275(a) of the 1996 Act.¹ In the Petition, Ameritech requested that the Commission reconsider its decision in the *Order*, and grant in full or in part Ameritech's petition for forbearance.

The primary arguments advanced by Ameritech were that the "changed circumstance" test applied by the Commission in the *Order* was (1) inconsistent with the structure and language of both Section 10 and the 1996 Act as a whole (Petition at 3-6) and (2) contrary to other Commission precedent applying Section 10 (*id.* at 6-10). These arguments are simply not answered by either the AICC or AT&T. Neither pointed to any statutory language in Section 10 suggesting, much less requiring, a showing of changed circumstances.² Neither endeavored to demonstrate that the *Order* was consistent with earlier decisions under Section 10. In short, neither AT&T nor the AICC even attempted to counter Ameritech's primary arguments for reconsideration.

¹ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 47 U.S.C. §§ 160 and 275(a).

² The AICC did argue, as it had in its original opposition to the forbearance petition, that Section 10 would be unconstitutional if the Commission did not apply a changed circumstances test (AICC Opp. at 3-4). However, this facile analysis was shown to be incorrect by Commissioner Powell (FCC 99-215, Cmr. Powell dissenting, at 2-3). Ameritech need not address the issue further, except to note that the AICC's argument, if correct, would mean that the Commission's prior orders granting forbearance under Section 10 must be unconstitutional because the Commission did not apply a changed circumstances test.

Instead, both AT&T and the AICC focused on Ameritech's subsidiary argument, which was that even if a showing of changed circumstances were necessary, Ameritech could make such a showing (*see* Petition at 10-13). In light of the strength of Ameritech's primary (and still unanswered) arguments for reconsideration, the Commission need not even consider this subsidiary argument. Should it do so, however, it should conclude that this ground, too, justifies reconsideration of its decision not to forbear.

Ameritech identified two changed circumstances that warranted reconsideration. First, although the overarching purpose of Section 275 was to benefit the owners of small alarm monitoring businesses in the highly fragmented alarm monitoring industry, largely by insulating them from competition with large companies (Petition at 10-11), recent structural changes in the alarm monitoring industry mean that enforcement of Section 275(a) will now hurt, rather than benefit, those small alarm monitoring companies (Petition at 10-12). This anomalous result occurs because, in the three and one-half years since the provision was enacted, circumstances in the industry have changed substantially. Specifically, the industry has been, and still is, undergoing consolidation. Enforcing Section 275(a) will not insulate small alarm companies from competition with large companies because such competition is already present and is growing. Enforcement of Section 275(a), however, will harm those small companies who wish to sell their assets by depriving them of a willing and financially able potential buyer. Ameritech showed, and AICC does not contest, that Section

275(a), by eliminating Ameritech as a potential buyer, is harming the ability of smaller alarm monitoring business owners to obtain fair value for the businesses they wish to sell.

The second changed circumstance identified by Ameritech was that the crucial scenario that prompted Congress to enact Section 275(a) – the possibility that an RBOC might have the ability to discriminate *successfully* against competing alarm monitoring service providers through its control of the local loop "bottleneck" – has simply failed to materialize (Petition at 11).

AT&T does not assert that the evidentiary material submitted by Ameritech does not demonstrate changed circumstances; rather, AT&T claims that Ameritech has not demonstrated compliance with Rule 1.106(b)(2) because it could have submitted this material prior to the issuance of the *Order* on August 11, 1999 (AT&T Opp. at 3, n.9). While it may be true that Ameritech could have submitted certain of this material prior to August 11, AT&T's argument misses the point – prior to that date, neither the statute nor any Commission precedent had given Ameritech reason to believe it needed to submit such evidence to meet the Section 10 test. It was only after the *Order* was issued that the need to demonstrate changed circumstances, a requirement which had not previously been imposed by the Commission, became apparent. Thus, this case falls precisely within Rule 1.106(b)(2). Moreover, in light of the new legal requirement imposed in the *Order*, the Commission can and should determine that consideration of the factual material submitted with the Petition "is required in the public interest" under Rule 1.106(c)(2).

The AICC similarly did not challenge any of the facts demonstrated in the Petition. Instead, after mischaracterizing the conclusions Ameritech would have the Commission draw from those facts, it argued that the mischaracterized conclusions do not constitute sufficient changed circumstances to warrant forbearance (AICC Opp. at 5-9). For example, the AICC did not deny the fact that small alarm company owners, the intended beneficiaries of Section 275(a), were harmed because they were receiving lower prices for their assets due to Ameritech's exclusion as a potential purchaser. Also, the AICC did not address the question of whether this means that enforcement of Section 275(a) is less advantageous to the intended beneficiaries than forbearance (a circumstance that certainly was not foreseen by Congress when it enacted Section 275). Instead, the AICC set up a series of straw men -- statements such as "the purposes of Section 275 do not include facilitating mergers and acquisitions of alarm monitoring businesses" -- and summarily dismissed all of them with no attempt at analysis (AICC Opp. at 7). Ameritech is confident that a full and impartial analysis of the conclusions to be drawn from those facts will lead to the conclusion that any necessary changed circumstances do indeed exist.

Finally, with regard to the second changed circumstance, the AICC does not dispute the fact that no alarm monitoring provider has even alleged, let alone proven, discriminatory or anticompetitive behavior on the part of Ameritech. However, it attempts to negate the effect of what it characterizes as Ameritech's "alleged good behavior" by stating that Congress enacted Section 275(a) based on the assumption that it was "necessary in order

to safeguard against discrimination and anticompetitive behavior" against alarm monitoring providers (AICC Opp. at 8). AICC misses the point. Ameritech's good behavior since its entry into the alarm monitoring business, and particularly during the almost four years since the passage of Section 275(a), establishes that an RBOC can compete vigorously in the alarm monitoring market without engaging in discriminatory or anticompetitive conduct – something which, according to AICC's own statement, was not anticipated by Congress.

Conclusion

The oppositions have not shown that application of a changed circumstances test is authorized by Section 10 or any other provision of the statute. Moreover, they have not addressed the argument that the *Section 275(a) Forbearance Order* is inconsistent with the Commission's prior decisions under Section 10. For the reasons set forth above and in Ameritech's Petition, the Commission should grant the petition for reconsideration and apply the statutory test set forth in Section 10. Once it applies the forbearance test properly to the

complete record before it, the Commission should determine that forbearance is appropriate and in the public interest.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of November, 1999, copies of the foregoing Petition for Reconsideration were served by prepaid, first class U.S. mail or hand delivery* on the following:

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